

IT 04-10

Tax Type: Income Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE
Respondent, as responsible officer for
Doe Electrical Service**

**A. H. DOCKET # 03-IT-0000
NOD# 0000
SS# 000-00-0000
FEI# 00-0000000**

**Barbara S. Rowe
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. David R. Reid for John Doe; Mr. Kent R. Steinkamp, Special Assistant Attorney General for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to John Doe's (hereinafter referred to as "Doe" or "Respondent") protest of Notice of Deficiency No. XXXX (hereinafter referred to as the "NOD") issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") to Doe as a responsible employee of Doe Electric Services, Inc. (hereinafter referred to as "DES" or the "Corporation") for the first and second quarters of the 2000 tax year. The issue for hearing is whether Doe was an officer or employee responsible for the filing of Illinois employee withholding tax returns and making the payment of the taxes due thereon and whether he willfully failed to file and/or pay those to the State. Following the submission of all evidence and a review of the record, it is recommended that the matter be resolved in favor of the Respondent. In support thereof, I make the following findings of fact and conclusions of law in

accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 ILCS 100/10-50).

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence, under the certificate of the Director, of NOD No. XXXX dated November 26, 2002 issued against Doe showing withholding tax liability for DES in the amount of \$9,210.65 for the first and second quarters of 2000. (Dept. Ex. No. 1; Tr. p. 9).

2. DES was incorporated under the Illinois Business Corporation Act on March 19, 1997:

To engage in the business of commercial, residential, agricultural and industrial contracting and installation, remodeling and repair of electrical services including the sale of wiring, electrical fixtures, etc.

To acquire, own, use, lease as lessor or as lessee, convey and otherwise deal in and with real property and any interest therein;

To carry on the transactions of any and all lawful business for which corporations may be incorporated under the Illinois Business Corporations Act. (Respondent's Ex. No. 2).

3. The registered agent of DES was Mr. Smith. 1,000 common shares were authorized at \$1.00 per share. The initial 1,000 shares were divided equally between Mr. Smith and Doe. (Respondent's Ex. Nos. 1, 2, 10, 11).

4. The Board of Directors of DES were elected on May 7, 1997 and consisted of Mr. Smith and Doe. The officers of the Corporation on May 7, 1997 were Mr. Smith, as President and Treasurer, and Doe as Vice President and Secretary. (Respondent's Ex. Nos. 4, 5; Tr. pp. 59-60).

5. Community Bank was designated as the depository for the funds of the Corporation and checks, drafts, or other withdrawal orders issued against the funds of the Corporation could be signed by either Mr. Smith or Doe. (Respondent's Ex. No. 5; Tr. pp. 24-25).

6. On November 1, 1997 Doe sold 300 of his shares to Mr. Smith and 100 of his shares to Joe Blow. The number of directors of the Corporation was increased to three, with Joe Blow as the third director. (Respondent's Ex. Nos. 7, 8, 10).

7. On November 1, 1997 Doe was removed as Secretary of the Corporation and Joe Blow assumed those duties. (Respondent's Ex. No. 8).

8. Joe Blow was also a signatory on the checking account for DES. (Tr. p. 29).

9. On January 2, 1998, Mr. Smith transferred 510 of his shares to Mrs. Smith, his wife. Mrs. Smith replaced Mr. Smith as Treasurer. Another director's position was added and Mrs. Smith became that fourth director. (Respondent's Ex. Nos. 9, 9A, 10, 11; Tr. p. 32).

10. The Employer's Contribution and Wage Report forms submitted to the Department of Employment Security for 1998, 1999 and 2000 for DES were signed by Mr. Smith as President. (Respondent's Ex. No. 12).

11. The IL-941 Illinois Quarterly Withholding Income Tax Returns for DES for quarters ending March 31, 2000 and June 30, 2000 were signed by Mr. Smith and received by the Department on July 31, 2000. (Respondent's Ex. No. 13; Tr. pp. 15-16).

12. The NUC-1 Illinois Business Registration in §2 ¶14 states:

By law, someone representing your business must complete the following information or we cannot process this form.

I accept personal responsibility for the filing of returns and the payment of taxes due.

(Signed, dated 11/6/97).
Mr. Smith, President
(Dept. Ex. No. 3).

13. The headquarters of DES were at the personal home of Mr. Smith. (Dept. Ex. Nos. 1, 3; Respondent's Ex. Nos. 1, 2, 3, 6; Tr. pp. 23, 52).

14. Doe began to work for DES in 1997. He worked for the company through May 2000. (Tr. pp. 20-21).

15. Doe was a job foreman for DES. He coordinated the work and assigned tasks at the job site. He assured that the materials needed were present. Doe went straight to the job site when he went to work. (Tr. pp. 22, 28, 59).

16. Doe has an Applied Science Degree in heating, cooling and refrigeration. He ran his own service business before joining DES. He never took classes in finance or accounting. (Tr. p. 20).

17. DES employed bookkeepers that were responsible for entering and paying bills and payroll. They worked at headquarters with Mr. Smith. The computer program they used printed checks, which they gave to Mr. Smith to sign. (Tr. pp. 40-42, 46 (XXXX, bookkeeper); 53 (XXXXXX, bookkeeper)).

18. Doe signed payroll checks when they arrived at the job site without signatures or when Mr. Smith could not be reached. (Tr. pp. 23-24).

19. Doe did not hire or fire employees; Mr. Smith was responsible for that task. The Respondent was not consulted about which bills would be paid or the workings of the corporation. (Tr. pp. 26-27, 31, 34-35, 38).

20. Respondent found out about this liability when he received a letter from the Department in 2001. (Tr. p. 36).

CONCLUSIONS OF LAW:

The sole issue to be decided in this case is whether Doe is personally liable for the unpaid withholding tax for Doe Electric Services, Inc. as required by the Illinois Income Tax Act (hereinafter referred to as the “IITA”), 35 **ILCS** 5/101 et seq. The IITA at §1002(d) imposes the penalty at issue and, in relevant part, reads as follows:

Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and interest Act. 35 **ILCS** 5/1002(d).

Section 3-7(a) of the Uniform Penalty and Interest Act (hereinafter referred to as the “UPIA”) provides as follows;

(a) Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who willfully fails to file the return or make the payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon. The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceedings by reproduced copy of computer printout of the Department’s record relating thereto in the name of the Department under the certificate of the Director of Revenue 35 **ILCS** 735/3-7(a).

These sections, taken together, prescribe two tests to determine if an individual is personally liable for unpaid withholding tax. First, under both provisions, the person must be

responsible for accounting for and paying the tax due. Second, the individual must willfully fail to file or pay the tax shown to be due on the payroll tax returns.

The admission into evidence of the NOD under the Director's certificate establishes the Department's *prima facie* case with regard to both the fact that Doe was a "responsible" officer and the fact that he "willfully" failed to file and/or pay. Branson v. Department of Revenue, 168 Ill.2d 247, 262 (1995). Once the Department has established a *prima facie* case, the burden shifts to the taxpayer to overcome the Department's case. Masini v. Department of Revenue, 60 Ill.App.3d 11 (1st Dist. 1978).

Section 3-7 of the UPIA does not define "responsible" person or "willful" conduct. However, the Illinois Supreme Court, in cases wherein it has considered personal liability, has referred to interpretations of similar language in §6672 of the Internal Revenue Code (26 USCA §6672). Branson v. Department of Revenue, *supra*; Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19 (1985); Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568 (1977). Section 6672 imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and federal income withholding taxes.

Responsible persons may include officers who can borrow money on behalf of the corporation, Peterson v. Unites States, 758 F.Supp. 1209 (N.D. Ill 1990), and may be those with check writing authority who may or may not be the ones with the responsibility for accounting, bookkeeping or making of payments to creditors. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), *cert. denied* 400 U.S. 821 (1970); Wright v. United States, 809 F.2d 425 (7th Cir. 1987); Calderone v. United States, 799 F.2d 254 (6th Cir. 1986).

In determining whether an individual is a responsible person, the federal courts have

indicated that the focus should be whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. Monday v. United States, *supra*. The courts have considered specific facts in determining whether individuals were “responsible” for the payment of employee taxes, to wit: 1) the duties of the officer as outlined in the corporate by-laws; 2) the ability of the individual to sign checks of the corporation; 3) the identity of the officers, directors and shareholders of the corporation; 4) the identity of individuals who hired and fired employees; and 5) the identity of the individuals in control of the financial affairs of the corporation. *Id.*; Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); Peterson v. United States, *supra*. Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

Being a corporate officer does not, *per se*, impose the duty to collect, account for and pay over the withheld taxes. Monday v. United States, *supra*. However, an officer may have that duty even though he does not have the treasury function. *Id.* He has the duty if he has general control over corporate business affairs and participates in decisions concerning payment of creditors. *Id.*

According to the bylaws of DES, the president is the principal executive officer of the corporation at the direction of the board of directors, the vice-president shall assist the president in the discharge of his duties as the president directs, the treasurer is principal accounting and financial officer of the corporation, and the secretary takes minutes of meetings, sees that notices are duly given, is custodian of the records, keeps a register of post-office addresses, signs with another officer certificates for shares, and has charge of the stock transfer books. (Respondent’s Ex. No. 6). Doe was the vice president throughout the liability period at issue; however,

according to the bylaws he did not have responsibility for the financial affairs of the Corporation. Although he did have signatory authority on the bank account, he only signed checks when Mr. Smith was not available. As vice president, Doe's responsibilities were to assist Mr. Smith as he directed.

The testimony and exhibits in this case establish that Mr. Smith had complete control of DES. His home contained the offices of DES. The bookkeepers worked in his home. The Respondent was the job supervisor. He would report for work at the job site. He infrequently visited the office at the home of Mr. Smith, and at those times it was only to pick up blueprints or specifications for the jobs. (Tr. p. 25). Doe never took accounting or financial classes in school. He never took checks from the office (Tr. p. 23) and only signed checks when they arrived at the job site with no signature. (Tr. 24). Therefore, there is no evidence that Doe is the person responsible for accounting for and paying the tax due.

The Respondent did not receive a daily, weekly, or monthly financial reports of checking account statements or any other financial information indicating the financial position of DES. (Tr. p. 25). Doe did not know specifically that the Illinois Department of Revenue was not being paid. (Tr. p. 26). Everyone received his or her paychecks on time. (Tr. pp. 30, 42-44, 49-50). It was never difficult to get supplies because of DES's failure to pay its bills on time. (Tr. p. 30). I find Doe's testimony credible regarding the fact that he did not have knowledge of the financial affairs of the company. He worked as a supervisor at the job sites and would infrequently visit the business office. Bookkeepers, at the office, were responsible for entering and paying bills and payroll.

Mr. Smith signed the NUC-1 as the responsible officer for DES. He signed and filed the IL-941 Illinois Quarterly Withholding returns for the time period at issue. He signed as Mr.

Smith, president. His signature was also on the Employer's Contribution and Wage Report forms submitted to the Department of Employment Security for 1998, 1999 and 2000 for DES. Although there may be more than one responsible person in a corporation, (Monday v. United States, *supra*; Williams v. United States, 931 F.2d 805, 810 n. 7 (11th Cir. 1991)) I cannot find that Doe's actions showed sufficient reckless disregard or willfulness to hold him responsible for the withholding debts of DES.

For the foregoing reasons, it is recommended that NOD No. XXXX in the amount of \$9,210.65 be cancelled.

Respectfully Submitted,

Barbara S. Rowe
Administrative Law Judge
Date: October 14, 2004